OCT 28 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

---

MOTION TO AFFIRM

WILLIAM T. GRIFFIN,
233 Broadway,
New York City, New York.

HERBERT BURSTEIN,
135 Broadway,
New York City, New York.

INDEX

PAGE

STATEMENT 2

HISTORY OF THE LITIGATION 3

THE BACKGROUND FACTS 4

QUESTIONS PRESENTED 6

ARGUMENT 6

CONCLUSION 13

APPENDIX—Interstate Commerce Act 15

TABLE OF CASES CITED

Backus-Brooks Co. v. Northern Pacific R. Co., 21 F. (2d) 4, cert. den. 275 U. S. 562 9

Boston & Providence Railroad Corporation, Reorganization, 239 I. C. C. 465 ..... 5, 8

Boston & Providence Reorganization Proceeding, 290 I. C. C. 404 10

Bowman v. Loperna, 311 U. S. 262 2

Canton Railroad Company v. Ann Arbor Railroad Company, et al., 163 I. C. C. 263 10

Federal Trade Commission v. Minneapolis-Honeywell Regulator Company, 344 U. S. 206 2

Gazan v. Vadsco Sales Corporation, 6 F. Supp. 568 (E. D. N. Y.) 13

General American Tank Car Corporation v. El Dorado Terminal Company, 308 U. S. 422, rehearing denied 309 U. S. 694 8

PAGE

Guardian Trust, et al. v. Kansas City Southern Ry. Co., 28 F. 2d 233 (C.A. 8), reversed on other grounds, 281 U. S. 1 13

Interstate Commerce Commission v. Hoboken Manufacturers R. Co., 320 U. S. 368, rehearing denied 321 U. S. 801 10

Interstate Commerce Commission v. U. S. ex rel. Humboldt Steamship Co., 224 U. S. 474 11

Koster v. (American) Lumberman's Mutual Casualty Company, 330 U. S. 518 12

Long v. Stites, 88 F. 2d 554 (C.A. 6), cert. den. 301 U. S. 706 12

Lucking v. Delano, 129 F. 2d 283 (C.A. 6) 12

Massachusetts v. Mellon, 262 U. S. 447 11

National Labor Relations Board v. Mackay Radio & Teleg. Co., 304 U. S. 333 2

New York, N. H. & H. R. Co., In re, 169 F. 2d 337 (C.A. 2), cert. den. 335 U. S. 867 ..... 4, 6, 8

New York, New Haven and Hartford Railroad Company, Reorganization, 224 I. C. C. 723 5

N. J. & N. Y. Railway Co. (Peter Duryee, Trustee) v. Erie Railroad Company, et al., 292 I. C. C. 479, reversing 288 I. C. C. 219 10

Palmer v. Palmer, 104 F. 2d 161 (C.A. 2), cert. den. 308 U. S. 590 9

Palmer v. Warren, 108 F. 2d 164 (C.A. 2) 4

Pittsburgh & W. Va. Railway v. United States, 281 U. S. 479 11

Rochester Telephone Corporation v. United States, etc., 307 U. S. 125 11

Secretary of Agriculture of the United States v. United States, etc., 347 U. S. 645 8

PAGE

Southern Pacific Co. v. Conway, 115 F. (2d) 746 (C.A. 9) 2

Sprague v. Ticonic National Bank, 307 U. S. 161 13

Swartz, In re, 130 F. (2d) 229 (C.A. 7) 13

Thompson v. Baltimore & O. R. Co., et al., 59 F. Supp. 21, modified on other grounds, 155 F. (2d) 767, cert. den. 329 U. S. 761, motion overruled 72 F. Supp. 65, cert. den. 329 U. S. 762 9

United States v. Abilene & S. R. Co., 265 U. S. 274 9

United States v. Alabama Railroad Co., 142 U. S. 615 10

United States v. American Trucking Associations, 310 U. S. 534 10

United States v. Baltimore and Ohio Railroad Company, et al., 333 U. S. 169 8

U. S. v. Great Northern R. Co., 343 U. S. 562 10

U. S. ex rel. Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638 11

United States v. Mo. Pac. R. Co., 278 U. S. 269 10

Warren v. Palmer, 310 U. S. 132 ..... 4, 5, 7

Wood v. New York Central R. Co., 286 I. C. C. 373 10

Zeleznik v. Grand Rivera Theatre Co., 128 F. 2d 533 (C.A. 6) 12

STATUTES CITED

	PAGE
Administrative Procedure Act, Section 10	10
Bankruptcy Act:	
Section 77	4, 5, 7
Section 77(c)(6)	5
Section 77(c)(10)	5
Federal Rules of Civil Procedure:	
Rule 2	12
Rule 15(d)	2
Rule 23(b)	11, 12
Interstate Commerce Act:	
Section 1(1)(a)	8, 9
Section 1(3)(a)	8, 9
Section 1(4)	8, 9
Section 6(1)	9
Section 6(3)	9
Section 13(1)	3
Section 15(3)	9
Section 15(6)	3, 7, 9, 10
Supreme Court, Revised Rules, Rule 16, para. 1(c)	1
5 U.S.C. 1009	10
11 U.S.C. 205	4, 5

PAGE

11 U.S.C. 205(c)(6) 5
11 U.S.C. 205(c)(10) 5
28 U.S.C. 41(27)(28) 12
28 U.S.C. 1336 12
28 U.S.C. 1398 12
28 U.S.C. 2284 2
28 U.S.C. 2321 to 2325 ..... 2, 12
49 U.S.C. 1, et seq. 7
49 U.S.C. 15(6) 3, 7
36 Stat. 1091 12
36 Stat. 1148 12
38 Stat. 219 12
62 Stat. 931 12

MISCELLANEOUS CITED

Attorney General's Manual on the Administrative Procedure Act, page 136 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

---

MOTION TO AFFIRM

Appellee, The New York, New Haven and Hartford Railroad Company, moves pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court that the orders and judgment of the District Court be affirmed.

Statement

This purports to be a direct appeal from certain final orders entered on March 31, 1955, May 6, 1955, June 15, 1955 and July 1, 1955,[1] by a three judge District Court, convened pursuant to 28 U. S. C. 2284, 2325. Primarily, appellants seek review of the order of March 31, 1955, which dismissed the complaint in appellants' action to set aside an order of the Interstate Commerce Commission dated July 13, 1954 (Jurisdictional Statement, Appendix, p. 1a).

---

[1] Appellants state (Jurisdictional Statement, p. 3) that they filed "their notice of appeal from all of the foregoing orders on July 5, 1955." While a timely motion for reargument or rehearing may toll the time for appeal from the original order, the order of May 6, 1955, denying the motion and the order of July 1, 1955 (Jurisdictional Statement, Appendix 15a) are not appealable as separate and distinct final orders. The denial of the motion for rehearing or reargument merely suspends the date when the original order becomes final for purposes of review. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company*, 344 U. S. 206; *Bowman* v. *Loperna*, 311 U. S. 262; *National Labor Relations Board* v. *Mackay Radio & Teleg. Co.*, 304 U. S. 333; Moreover, appellants have no standing to seek review of the order of the District Court denying the application of the trustee of the Boston and Providence Railroad Corporation for leave to intervene. It is not clear whether appellants also seek review of that part of the order of May 6, 1955 which granted a motion by a stockholder of Boston and Providence to intervene (Jurisdictional Statement, p. 25). So, too, the order of July 1, 1955, denying appellants' motion to amend the order of June 15, 1955 which taxed appellants with costs is not appealable. As to that part of the order which denied leave to file a supplemental pleading under Rule 15(d) of the Federal Rules of Civil Procedure (Jurisdictional Statement, p. 26) appellants suggest no basis for a remand of the case to permit the filing of a supplemental pleading. *Southern Pac. Co.* v. *Conway*, 115 F. (2d) 746, 751 (C.A. 9th). Essentially, therefore, the appeal is directed to the order of March 31, 1955 which dismissed the appellants' complaint.

History of the Litigation

A brief history of this litigation will serve to bring the issues into focus.

On March 17, 1954, four stockholders of the Boston and Providence Railroad Corporation (herein called "Boston & Providence") filed a complaint with the Interstate Commerce Commission (herein called the "Commission") against The New York, New Haven and Hartford Railroad Company (herein called "New Haven") requesting an investigation and an order under Section 15(6) of the Interstate Commerce Act (49 U. S. C. Sec. 15(6)) fixing and prescribing a division of joint rates between Boston & Providence and New Haven (Jurisdictional Statement, p. 22).

By an order, dated July 13, 1954, the Commission dismissed the complaint on the grounds that it had no authority to prescribe a division of rates in the absence of joint rates between Boston & Providence and New Haven and that there was no reasonable ground for further investigation under Section 13(1) of the Interstate Commerce Act (Jurisdictional Statement, Appendix p. 1a).

The appellants then instituted an action to set aside the Commission's order of July 13, 1954, but on March 31, 1955, a three-judge District Court dismissed the complaint (Jurisdictional Statement, p. 23; Appendix, p. 2a, et seq.).

In its careful and comprehensive opinion, the District Court reviewed all of the contentions advanced by appellants and concluded that since Boston & Providence was not a carrier and does not have joint rates with New Haven, it is not entitled to a division of rates and, accordingly, the Commission had no authority to order it (Jurisdictional Statement, Appendix pp. 11a-12a). While the District Court held that appellants had no standing to maintain the action (Jurisdictional Statement, Appendix pp. 8a-9a) it nevertheless considered and disposed of the

case on the merits (Jurisdictional Statement, Appendix pp. 9a-12a).

In this appeal, appellants seek to relitigate issues previously considered and decided by the Court of Appeals for the Second Circuit and by this Court. *Palmer* v. *Warren*, 108 F. 2d (C.A. 2) 164; *Warren* v. *Palmer*, 310 U.S. 132; *In re New York, N. H. & H. R. Co.*, 169 F. 2d 337 (C.A. 2), cert. den. 335 U. S. 867.

A brief review of certain essential facts and the governing decisional precedents is persuasive that this appeal presents no substantial question which warrants further review by this Court.

The Background Facts

In 1888, Boston and Providence leased all of its properties to the Old Colony Railroad Company (herein called "Old Colony") for a term of ninety-nine years, at an annual rental of $400,000, plus bond interest, taxes and $3,000 for organization expenses.

In 1893, New Haven leased the properties of Old Colony, including Old Colony's leasehold interests in Boston and Providence, under a ninety-nine year lease. Since 1893, the Boston & Providence's line of railroad has constituted part of the main line of New Haven's system between Boston and New York.

On October 23, 1935, New Haven filed a petition in the United States District Court for the District of Connecticut for a reorganization in accordance with Section 77 of the Bankruptcy Act (11 U. S. C. Sec. 205).

On June 2, 1936, New Haven's trustees rejected the lease of the Old Colony's properties.

On June 3, 1936, Old Colony filed its petition for reorganization in the same Connecticut court. The Court appointed the trustees of New Haven trustees of Old Colony. On June

18, 1936, the Court directed the trustees of New Haven to operate Old Colony, the operation being for the account of Old Colony.

On May 25, 1938, the Connecticut District Court entered an order, pursuant to Section 77(c)(10) of the Bankruptcy Act (11 U. S. C. Sec. 205(c)(10)) approving a formula submitted by New Haven's trustees which segregated and allocated the earnings and expenses among New Haven and various mortgaged and leased lines, including Old Colony and Boston & Providence.[2] No appeal was ever taken from this order.

On July 19, 1938, the trustees of Old Colony, upon direction of the Court, rejected the lease of Boston & Providence but continued to operate the road for the account of Boston & Providence pursuant to Section 77(c)(6) of the Bankruptcy Act (11 U. S. C. Sec. 205(c)(6)). Since that date, New Haven's trustees have continued to operate Boston & Providence's line of railroad.[3]

On August 4, 1938, a petition for the reorganization of Boston & Providence, under Section 77 of the Bankruptcy Act (11 U. S. C. Sec. 205) was filed in the United States District Court for the District of Massachusetts. *Boston & Providence Railroad Corporation Reorganization*, 239 I. C. C. 465.

On September 11, 1947, the Connecticut District Court entered a consummation order and final decree in the New Haven reorganization proceedings and the joint trustees were discharged. Under the terms of the final decree, New Haven was to continue to operate Boston & Providence,

---

[2] A detailed analysis of the trustees' method of segregation and allocation (which was referred to the Commission for review and recommendation) is set forth in *New York, New Haven & Hartford Railroad Company Reorganization*, 224 I.C.C. 723, 725-729. This formula was approved by the Commission.

[3] *Boston & Providence Railroad Corporation Reorganization*, 239 I.C.C. 465, 466; *New York, New Haven and Hartford Railroad Company, Reorganization*, 224 I.C.C. 723; *Warren* v. *Palmer*, 310 U. S. 132, 135-136; Jurisdictional Statement, pages 13 to 16.

subject to the reserved jurisdiction of the Court to act on all matters concerning claims between the reorganized New Haven and Boston & Providence arising out of the plan of reorganization or out of the operation of the lines of Boston & Providence by the reorganized New Haven. The order and final decree were affirmed on June 29, 1948, upon an appeal taken by the trustee of the Boston & Providence. *In re New York N. H. & H. R. Co.*, 169 F. 2d 337 (C.A. 2), cert. den. 335 U. S. 867.

The reorganization of Boston & Providence is not yet completed and New Haven continues to operate the former's lines subject to the continuing jurisdiction of the Connecticut District Court.

Questions Presented

(A) Did the District Court err when it dismissed the complaint on the ground that the Commission correctly concluded that it had no jurisdiction to prescribe a division of rates in the absence of joint rates between Boston & Providence and New Haven and that appellants had no standing to institute and maintain the suit in the District Court?

(B) Did the District Court err in taxing extraordinary costs in favor of New Haven.

Argument

1. Appellants' principal contention is that the Commission has the sole jurisdiction over a division of rates between Boston & Providence and New Haven and is under a duty to exercise that power notwithstanding the reservation, by the Connecticut District Court, of jurisdiction to pass upon the accounts between Boston & Providence and New Haven (Jurisdictional Statement, pp. 28-30). Apart from the fact that appellants' construction of the powers reserved to the Connecticut District Court is clearly negated by the decision in *In re New York, N. H. & H. R. Co.*,

169 F. (2d) 337 (C.A. 2), cert. den. 335 U. S. 867, its reliance upon Section 15(6) of the Interstate Commerce Act (herein called the "Act") is misplaced.

When appellants filed their complaint with the Commission, they sought, obviously, an order prescribing a division of rates under Section 15(6) of the Act. The Commission denied relief and dismissed the complaint, not because it assumed, as appellants suggest, that Section 77 of the Bankruptcy Act supersedes the Interstate Commerce Act (49 U. S. C. Sec. 1 et seq.) or forecloses a proceeding under Section 15(6) of the Interstate Commerce Act (Jurisdictional Statement, pp. 26-28) but for want of authority (Jurisdictional Statement, Appendix p. 1a).[4]

The District Court rejected the appellants' complaint to vacate the Commission's order for the reason, among others, that the relief sought was an order directing the Commission to "require New Haven to account to B & P in a manner other than by the formula adopted therefor by the District Court in Connecticut when the formula has the approval of the Commission and the Connecticut Court's authority to ascertain the amounts, if any, due to B & P has been sustained by the Court of Appeals for the Second Circuit as well as by the Supreme Court" (Jurisdictional Statement, p. 9a).

Clearly, the District Court had "neither the right nor the jurisdiction to grant" the relief sought by appellants (Jurisdictional Statement, Appendix p. 9a). To do so would amount to reversal of the May 25, 1938 order of the Connecticut District Court which confirmed, with the approval of the Commission, a segregation formula. No appeal had ever been taken from this order.

Moreover, to grant the relief sought by appellants would be tantamount to a vacatur of the Connecticut District

---

[4] In *Warren* v. *Palmer*, 310 U. S. 132, 138 this Court pointed out that: "The judicial functions of the bankruptcy court and the administrative functions of the Commission work cooperatively in reorganizations."

Court's final decree of September 11, 1947, which was affirmed by the Court of Appeals for the Second Circuit. *In re New York, N. H. & H. R. Co.*, 169 F. 2d 337 (C.A. 2), cert. den. 335 U. S. 867.

The Commission's order of July 13, 1954 (Jurisdictional Statement, Appendix p. 1a) is plainly correct, as an analysis of the Act proves.[5]

Section 1(3)(a), read with Section 1(1)(a), of the Act defines a common carrier to include persons engaged in transportation of property or passengers for hire. A "railroad" is defined in terms of facilities. Transportation embraces the instrumentalities and facilities of shipment or carriage, the delivery of freight and the furnishing of transportation facilities to shippers upon request. *United States* v. *Baltimore and Ohio Railroad Company, et al.*, 333 U. S. 169, 176; *Secretary of Agriculture of the United States* v. *United States, etc.*, 347 U. S. 645, 647; *General American Tank Car Corporation* v. *El Dorado Terminal Company*, 308 U. S. 422, 428, rehearing denied 309 U. S. 694.

Boston & Providence does not meet the statutory or decisional standards for an operating railroad and carries on no railroad operations. That Boston & Providence is not a carrier is evidenced by the fact that it has neither operating personnel nor equipment nor facilities for transportation. *The Boston & Providence Railroad Corporation Reorganization*, 239 I. C. C. 465, 379, 290 I. C. C. 363, 290 I. C. C. 404.

Section 1(4) of the Act requires every railroad to furnish transportation, to establish through routes with other railroads, to establish rates applicable both to transportation over the railroad's own lines and over a combination

[5] Provisions of the Act other than those set forth in the Jurisdictional Statement, pp. 5-6, are reprinted in the Appendix to this Motion (pp. 15-18, infra).

of lines in a through route arrangement and to establish a just and equitable division of joint rates.

Under Section 6(1) of the Act,[6] all railroads must file, with the Commission, schedules of rates covering transportation over its own route, and, where a through route and a joint rate with another railroad has been established, schedules showing the joint rates covering transportation between points on its own route and on the route of a connecting carrier. Where a joint rate has not been established, all the railroads participating in the through route arrangement, must file separately established rates applicable to the through transportation.

Section 15(3) of the Act authorizes the Commission to establish through routes and joint rates and the Commission is authorized, by the provision of Section 15(6), to prescribe "just, reasonable and equitable divisions" of joint rates where, after hearing upon a complaint or the Commission's own motion. it is determined that existing divisions are or will be unjust and inequitable.

Sections 1(1)(a), 1(3)(a), 6(1), 6(3), 15(3), as well as Sections 1(4) and 15(6) of the Act, must be integrated into a coherent pattern. *Palmer* v. *Palmer,* 104 F. 2d (C.A. 2) 161 cert. den. 308 U. S. 590.

Proceedings under Section 15(6) of the Act have always been bottomed upon joint rates which have been established, either voluntarily, pursuant to Section 1(4), or by order of the Commission, as prescribed in Section 15(3). *Thompson* v. *Baltimore & O. R. Co., et al.,* 59 F. Supp. 21, 33-34, modified on other grounds, 155 F. (2d) 767, cert. den. 329 U. S. 761, motion overruled 72 F. Supp. 65, cert. den. 329 U. S. 762. *Backus-Brooks Co.* v. *Northern Pacific R. Co.,* 21 F. (2d) 4, cert. den. 275 U. S. 562; *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274.

---

[6] Under Section 6(3) of the Act changes in joint rates are subject to the jurisdiction of the Commission.

A non-operating railroad, like Boston & Providence, which has no equipment, provides no transportation service and publishes neither individual nor joint fares, cannot divide a joint rate which does not exist. *Boston & Providence Reorganization Proceeding,* 290 I. C. C. 404, 410-412. Revenue from a service which is not covered by a joint rate cannot be divided by order of the Commission under Section 15(6). *Interstate Commerce Commission* v. *Hoboken Manufacturers R. Co.,* 320 U. S. 368, rehearing denied 321 U. S. 801. This accords with the Commission's consistent construction of the statute. *Wood* v. *New York Central R. Co.,* 286 I. C. C. 373; *Canton Railroad Company* v. *Ann Arbor Railroad Company, et al.,* 163 I. C. C. 263.

This Court has repeatedly held that the contemporaneous and long-settled construction of an Act by the agency charged with its enforcement is entitled to great weight. *United States* v. *American Trucking Associations,* 310 U. S. 534, 549; *United States* v. *Mo. Pac. R. Co.,* 278 U. S. 269, 280; *United States* v. *Alabama Railroad Co.,* 142 U. S. 615.[7]

The appellants incorrectly assume that Section 10 of the Administrative Procedure Act (5 U. S. C. 1009) grants an extraordinary right of review. On the contrary, Section 10 of the Administrative Procedure Act is declaratory of the pre-existing law concerning judicial review. *Attorney General's Manual on the Administrative Procedure* Act, page 136.

2. For reasons hereafter stated, it appears evident that the appellants have no standing to prosecute this suit. As the District Court suggested, the gravamen of the suit is to compel the Commission to assume jurisdiction and the

[7] Appellants rely upon the decisions in *U. S.* v. *Great Northern R. Co.,* 343 U. S. 562 (Jurisdictional Statement, p. 27) and *N. J. & N. Y. Railway Co. (Peter Duryee, Trustee)* v. *Erie Railroad Company, et al.,* 292 I.C.C. 479, reversing 288 I.C.C. 219. In both cases, there were joint rates in existence. Consequently, the power of the Commission under 15(6) is self-evident.

remedy, if any, is by way of mandamus maintainable in the Courts for the District of Columbia (Jurisdictional Statement, Appendix p. 10a). *Interstate Commerce Commission* v. *U. S. ex rel. Humboldt Steamship Co.*, 224 U. S. 474; *U. S. ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638.[8]

3. The District Court correctly concluded that the appellants had no standing to institute and maintain an action to review the order of the Commission (Jurisdictional Statement, pp. 8a-9a). Assuming, but not conceding, that the directors of the Boston & Providence are "legally inactive" (Jurisdictional Statement, p. 40) the stockholders are not thereby qualified to institute a derivative stockholders suit. The fact that anyone may file a complaint with the Commission, does not give that person standing to institute suit in a District Court. *Pittsburgh & W. Va. Railway* v. *United States*, 281 U. S. 479.

Rule 23(b) of the Federal Rules of Civil Procedure, prescribes a method for the institution of a derivative stockholders' action. Merely because the action, in this case,

---

[8] In *Rochester Telephone Corporation* v. *United States, etc.*, 307 U. S. 125, 129, this Court discussed three categories of negative orders. While it would appear that the Commission's order falls within the third group of cases reviewed by the Court, an analysis of the facts indicates that the case does not involve: "review * * * of an action by the Commission which affects the complainant because it does not forbid or compel conduct with reference to him by a third person" (135). The relief sought by the appellants does not affect the appellants and does not relate to "conduct with reference" to appellants. The division of rates would affect the appellants derivatively. Only Boston & Providence would be affected since any division of revenues would inure to the benefit of the Boston & Providence and not to the appellants. While the negative nature of the order would not preclude action by Boston & Providence, the principle of the Rochester case does not accord the right of review to persons who are otherwise without standing. The appellants' status may be equated with that of a taxpayer complaining of a wrong to the public generally. *Massachusetts* v. *Mellon*, 262 U. S. 447.

was instituted before a three-judge court does not nullify the provisions of Rule 23(b).[9]

A derivative stockholders suit may not be maintained unless the plaintiff stockholders have exhausted every remedy within the corporation. *Lucking* v. *Delano,* 129 F. 2d 283 (C.A. 6); *Long* v. *Stites,* 88 F. 2d 554 (C.A. 6), cert. den. 301 U. S. 706. Even where futility is pleaded, the corporation is the real party in interest and is an indispensable party. *Koster* v. (*American*) *Lumberman's Mutual Casualty Company,* 330 U. S. 518.

In the case at bar, there is no showing that an application to the corporation or the trustee of Boston & Providence to maintain the suit to vacate the Commission's order would have been futile. On the contrary, it appears that the trustee of the Boston & Providence sought leave to intervene as a plaintiff, but this application was denied by the District Court and no appeal was taken by the trustee (Jurisdictional Statement, p. 3). Appellants' suggestion that Rule 23(b) of the Rules of Civil Procedure applies only to active corporations is manifestly without merit. A corporation in reorganization is not foreclosed from bringing a stockholders derivative action. The "trustee stands in the place of the corporate entity." *Zeleznik* v. *Grand Rivera Theater Co.,* 128 F. 2d 533, 536 (C.A. 6).

4. The taxing of extraordinary costs was clearly within the discretion of the District Court. The allegation by the appellants that the taxing of extraordinary costs has no

---

[9] Sections 1336, 1398, 2321 to 2325 of Title 28 speak in terms of "a civil action." Section 1336 of Title 28 (62 Stat. 931) which is the fundamental statute is based on the provisions of former Section 41(27)(28) of Title 28, U. S. Code, March 31, 1911, 36 Stat. 1091, 1148; October 22, 1913, 38 Stat. 219. The codifiers substituted the words "any civil action" for "all cases" and "cases" in order to conform with Rule 2 of the Federal Rules of Civil Procedure. Clearly, Section 1336 must be integrated with the Federal Rules of Civil Procedure and except as otherwise specifically provided, all of the Federal Rules of Civil Procedure are applicable.

precedent in the Federal courts is erroneous (Jurisdictional Statement, p. 42). The appellants have set forth nothing in the Jurisdictional Statement beyond the order of the District Court (Jurisdictional Statement, Appendix 13a). But the papers on appeal disclose clearly the substantial grounds for the order taxing the costs. It was on the basis of a detailed review of the repetitive pleadings and petitions of the appellants and the fact that many of the issues had been litigated and relitigated that the District Court, in the exercise of its discretion, awarded extraordinary costs (Jurisdictional Statement, p. 8a).

The District Court has the equitable powers to tax costs against the unsuccessful party and include therein, reasonable attorneys' fees and expenses. *Sprague* v. *Ticonic National Bank,* 307 U. S. 161; *Guardian Trust et al.* v. *Kansas City Southern Ry. Co.,* 28 F. 2d 233 (C.A. 8), reversed on other grounds, 281 U. S. 1; *In re Swartz,* 130 F. 2d 229 (C.A. 7); *Gazan* v. *Vadsco Sales Corporation,* 6 F. Supp. 568 (E.D.N.Y.).

Conclusion

For all of the reasons herein set forth and because this appeal presents no substantial question, the order and judgment of the District Court should be affirmed.

Respectfully submitted,

WILLIAM T. GRIFFIN,
233 Broadway,
New York City, New York.

HERBERT BURSTEIN,
135 Broadway,
New York City, New York.

HERBERT BURSTEIN,
of Counsel.